Supreme Court, U.S.
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No. 00-1583

In The

Supreme Court of the United States

NANCY L. KAHN,

Petitioner,

v.

DEAN & FULKERSON, P.C., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals properly affirmed the district court's opinion granting summary judgment on Petitioner's Equal Pay Act (29 U.S.C. § 206(d)(1)) and Michigan's Elliott Larsen Civil Rights Act (MCLA § 37.2101, *et seq.*) where both courts found that there was no legally sufficient evidentiary basis for a reasonable jury to find that Petitioner's gender was a factor or played a role in:

(1) the compensation system which Petitioner negotiated in her written employment agreement with the Respondent law firm;

(2) the decision not to make Petitioner a shareholder or modify her compensation system after one year of employment based upon dissatisfaction with her interaction with other members of the firm; and

(3) the distribution of a one-time extraordinary bonus to Petitioner and certain other attorneys of the firm.

The Petition contains several misstatements of law and fact and mischaracterizes the holdings of the lower courts. The Court of Appeals properly held that Defendant retained the burden of proof under the Equal Pay Act. Defendants met their burden by providing evidence that their actions and compensation system were based on "factors other than sex." Petitioner failed to present any evidence in response to Defendants' motion for summary judgment sufficient to raise any triable issue of fact as to Defendant's proofs. This is consistent with the statutory requirements and interpretations of all circuit courts of appeal.

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STATEMENT OF THE CASE

Petitioner originally filed a seven-count Complaint in the District Court alleging a violation of the Equal Pay Act, 29 U.S.C. § 206(d)(1) ("the EPA"), fraud and misrepresentation, conversion, conspiracy, breach of express and implied contract, unjust enrichment, tortious interference with a contract, and sex discrimination in violation of the Michigan Elliott-Larsen Civil Rights Act, MCL §§ 37.2202, *et seq.* ("the ELCRA") against her former employer, the law firm of Dean & Fulkerson, P.C., and twenty individual shareholders (sometimes referred to as "partners") in the firm. The Sixth Circuit affirmed the District Court's grant of summary judgment dismissing Petitioner's Complaint. Petitioner now seeks to overturn the rulings dismissing her claims for violation of the Equal Pay Act and gender discrimination.

There is no basis to grant the Petition where the record reveals that there was no evidence that Petitioner's gender was a factor or played a role in her compensation system or her treatment at the firm. Although the Petition engages in an after-the-fact analysis that she might have fared better under a different system, she ignores the fact that her compensation structure was based on a contract arrangement which she proposed, negotiated, and executed after full disclosure and analysis of the various risks associated with potential alternative systems. Petitioner also ignores the fact that a similarly situated male lateral hire worked under a similar compensation system.

Petitioner's employment agreement resulted from her admitted reluctance to accept a more financially risky formula, under which she could have made less money – and potentially have been out-of-pocket – had she not

produced. Petitioner accepted an agreement under which she did not have to bear the risk of having to pay her direct overhead or her pro-rata share of the firm's overhead, in return for a lower percentage compensation formula. The firm agreed to accept the risk of Petitioner's overhead at a point in time when neither party knew how the financial situation would turn out. At the time of her hire, the decision makers could not have known that her actual billings would exceed the firm's and her own expectations.

Petitioner's initial contact with the firm was her March 4, 1994, letter to the "Managing Partner" opening with the salutation, "Dear Sir/Madam." Petitioner's blind inquiry indicated that her law firm was breaking up in a mere three weeks and that she was on an "ambitious timetable" and needed to "relocate quickly." Petitioner indicated that in submitting this application she was "willing to consider . . . *a contract arrangement with some salary flexibility.*"

At the time, the law firm of Dean & Fulkerson was not looking for an environmental attorney and had no attorneys on staff who worked in this area. The firm had previously referred environmental work to outside firms.

Petitioner initially received a phone call from one of the shareholders/partners at the firm, Paul Mastrangel. During this conversation, Petitioner was told the firm would only be interested in an environmental specialist who was self-sufficient, who could deliver income-producing clients and a book of business in the range of $300,000 per year. Petitioner indicated she had nothing close to this amount and assumed the firm was not interested. Petitioner received a subsequent phone call from William Coon, who indicated the firm may be interested

in talking to Petitioner. Petitioner testified that she was surprised to hear from Coon after her phone call with Mastrangel since she assumed the firm would not be interested in someone with a book of business at her level.

On March 15, 1994, Petitioner met with shareholders William Coon and Janet Lanyon for over three hours. Coon and Lanyon provided "great detail" about the compensation system for shareholders at the firm. During this meeting they discussed "risks" inherent in the shareholder compensation system.

Shareholders at the firm are not paid any salary or bonus. All shareholders, and a limited number of other attorneys, enter into contracts with the firm under which they are compensated on a formula basis. The formula requires that the attorney assume the risk for all of his or her individual overhead (*i.e.*, secretary, office furniture, benefits, etc.) and a pro-rata share of the general overhead of the firm (*i.e.*, rent, utilities, shared personnel, etc.). This combined overhead is estimated to be between $70,000 and $75,000 annually. Once the overhead is paid, attorneys receive 82% of the remaining fees on matters that they have billed personally and 18% of the remaining fees billed by themselves or others on clients which they have originated. Prior to Petitioner's letter of inquiry, two female lateral hires, Janet Lanyon and Carol Vondale, accepted this contractual formula.

The firm also had other methods of compensation. Associates are paid a straight salary and bonus. At least one other lateral hire, William Coon, accepted a reduced percentage of billings in exchange for the firm's agreement to pay his overhead. Coon accepted this system because he was uncertain whether he could generate

enough business to pay his overhead share and still have an acceptable level of compensation.

Over several weeks, Petitioner had discussions with Coon and Lanyon in which they fully explored potential compensation systems. The shareholder formula was initially offered and Petitioner was interested. In a memorandum to the Board, Coon recommended that the firm pursue Petitioner and stated, "she is willing to take the economic risk inherent in the D & F system and seeks, at most, a 60-90 day deferral of expenses. . . . She is attracted to our system and would like to pursue the possibility of joining D & F."

Petitioner subsequently told Coon and Lanyon, who had offered her the formula, that she did not want it because "she was concerned she would not earn the income level she desired if she chose the formula." Petitioner articulated "reluctan[ce]," fearing she would be unable to generate enough business to pay for her individual and shared overhead at the firm. As noted, an individual attorney's overhead at the firm was between $70,000 and $75,000. During the negotiations, Petitioner informed Coon that at her prior firm, she had never billed more than $69,000 on clients which she had originated. Although Petitioner "guessed" she might be able to generate $100,000 in billings for the firm, she documented to Coon and Lanyon that this amount was "by no means assured."

Prior to signing her employment agreement, Petitioner did several side-by-side comparisons to analyze how she would be compensated under the standard formula versus a "less risky" formula where the firm paid her overhead. In this analysis, Petitioner saw that if she generated a significant amount of work, over $175,000

per year, she would earn more under the standard formula. Conversely, if Petitioner did not generate that amount of business, she would earn more under the "less risky" alternative formula where the firm assumed the risk and paid her overhead.

Petitioner admitted that she told the firm she was "reluctant" to accept the risk of having to pay the firm's overhead. Petitioner admitted that she told the firm she "was not willing to run the risk of having to write them checks" for her overhead at the beginning of her employment. Petitioner eventually told the firm "I did not want to owe them money – then [Coon] offered the one year package." Based on Petitioner's admitted expressions of reluctance, the firm reasonably believed that she preferred the lower risk alternative. Petitioner testified that when the proposal was made that was "less risky" financially to her, she agreed.

Petitioner's choice not to accept the formula was reflected in a contemporaneous memorandum regarding her potential hire from shareholder Paul Mastrangel to the Board of Directors: "After early discussions . . . that the candidate was 'willing to take the economic risk inherent in the D & F system. . . . ' The candidate articulated on March 24, 1994 a preference for a 'shared risk' position. . . . "

Petitioner was provided drafts of the employment agreement, negotiated for changes in the agreement, and the firm agreed to her demands. Petitioner never asked for changes in the compensation formula set forth in the agreement.

On May 6, 1994, Petitioner signed the agreement under which the firm paid all of her overhead. The agreement provided that it would continue for a 12-month period unless terminated earlier by the firm "at any time and for any reason." The agreement also contained a merger and integration clause providing that "this agreement supersedes any prior agreement between the parties" and "constitutes the entire agreement of the parties."

The agreement did not contain any terms which obligated the firm to place Petitioner on the shareholder formula at the expiration of the contract, which required the firm to vote on whether Petitioner would be made a shareholder after the contract expired or which stated that Petitioner's compensation formula was for any less than one year.

Petitioner produced no evidence that her employment agreement was anything other than an arms-length transaction, negotiated by her, with terms favorable to her based on her assessment of the potential risks attendant to other alternatives. According to Petitioner, she had other options. Petitioner testified that she was discussing employment opportunities with at least three other firms, one of which had made her an offer. Petitioner chose to sign the agreement with Dean & Fulkerson.

As a result of the employment agreement, all of the other shareholders at the firm assumed the risk of paying for Petitioner's overhead if she failed to generate sufficient business. The cost of Petitioner's overheard was to be paid out of the other shareholders' income as a direct cost to them. If Petitioner generated no more billings than she had in the past, she would be employed at a loss. In an April 7, 1994 memorandum to all shareholders from

the Professional Personnel Committee of the firm, it was noted that the "approach" which Petitioner agreed to "would result in a loss to the firm in the event that Ms. Kahn generates significantly less than estimated and the firm provides $50,000 or less in work within the next twelve months." The firm agreed to accept this risk to the benefit of the Petitioner.

The courts below found that Petitioner made an economic choice based on her analysis of known risks and an uncertain future. The lower courts found no evidence that gender played any role in the negotiations and discussions which led Petitioner to sign the May 4, 1996 agreement. Although now, well after the fact, Petitioner may regret the choices that she made, the unrebutted evidence shows that Petitioner made these choices with full disclosure and knowledge of the potential risks and advantages available to her. Petitioner could not, on this record, link her gender to any of these historical facts.

In March 1995, a special meeting was held by the Board of Directors during which Petitioner's employment status with the firm was raised since her contract was expiring soon. Both Janet Lanyon and Carol Vondale, female shareholders, expressed serious displeasure with Petitioner regarding her handling of a conflict issue. Both Lanyon and Vondale told the shareholders present that they did not want Petitioner as a fellow shareholder.

The conflict situation had originally arisen before Petitioner actually began working at the firm, when Lanyon had to obtain a waiver from a firm client of both Lanyon and Vondale because Petitioner was representing a plaintiff in a suit in which the client was a defendant. When Lanyon obtained the waiver, she was told by the client's corporate counsel, "don't let this happen again."

At the time of her hire, Petitioner was fully aware of the firm client's displeasure with providing the conflict waiver.

In late 1994 Plaintiff approached Lanyon again and requested that she obtain another waiver from the same client. At the time of the request, Petitioner had already sent a demand letter to the firm's client. Lanyon discussed the matter with other shareholders and determined that a violation of the rules of professional conduct had occurred as a result of the demand letter sent by Petitioner, but felt she had no choice at that point but to obtain another waiver. Vondale was displeased because, although she was also working on matters for the client, Petitioner did not initially speak to her about the conflict issue and later treated the matter cavalierly, telling Vondale, "well this isn't a big client for you anyway, is it."

On May 22, 1995, the Board convened at a regular meeting. Lanyon and Vondale again spoke in opposition to Petitioner being made a shareholder. The firm's bylaws required a super majority of 75% for the addition of a shareholder, or the hiring or termination of an attorney. In the discussion, it became apparent that there were enough "no" votes to defeat any vote to make Petitioner a shareholder. Rather than hold a vote which would have resulted in a denial of shareholder status to Petitioner, the Board resolved to continue Petitioner's employment agreement on the same terms and conditions as the original agreement. Some shareholders testified they did so to save Petitioner the embarrassment of being rejected as a shareholder or terminated from employment. Other shareholders said they hoped Petitioner would redeem herself and rehabilitate herself in the eyes of the other shareholders.

Petitioner continued to work in the second year of her employment under the same terms and conditions contained in the original May 6, 1994 agreement. On August 11, 1995, Petitioner was given a memorandum confirming earlier discussions that her employment would continue on the terms of the original agreement.

In December 1995, Petitioner announced to the shareholders that she would be leaving the firm. Petitioner was never told by anyone at the firm that she had to leave or resign. Petitioner testified that four male shareholders urged her to reconsider and stay. Petitioner did not resign until four months after her announcement, on March 15, 1996. The following Monday, March 17, 1996, Petitioner accepted employment with a new law firm as a non-equity shareholder where she earned an equivalent or greater level of compensation despite working on a reduced basis. Petitioner lost no clients or business as a result of her relocation. Shareholders at Dean & Fulkerson allowed her to take clients and files with her and continued to refer her work.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT COURT DECISION DOES NOT CONFLICT WITH ANY RELEVANT DECISION OF THIS COURT.

Petitioner argues that the Circuit Court refused to apply "every one of the principles and holdings" in this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The argument is based on misunderstanding of *Reeves* and distortion of the Circuit Court opinion.

Reeves involved a claim of age discrimination in employment in violation of the Age Discrimination in Employment Act ("ADEA").[1] The jury had returned a verdict in favor of the plaintiff, and the district court denied the defendant employer's motion for judgment as a matter of law under Fed.R.Civ.P. 50(a). The Fifth Circuit reversed, holding that, under the *McDonnell Douglas*[2] formulation, where a defendant has articulated a legitimate nondiscriminatory reason for the challenged employment decision in response to the plaintiff's *prima facie* case, the plaintiff must present sufficient evidence directly showing that age was a motivating factor in the decision in order to create a triable issue for the jury.

This Court reversed, holding that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148 (emph. added).

In that the *McDonnell Douglas* formulation was developed for cases brought under Title VII of the Civil Rights Act of 1964[3], there is no question that the holding in *Reeves* applies to sex discrimination claims under Title VII. It is unclear, however, whether *Reeves* has any application to claims under the EPA.

Under the *McDonnell Douglas* formulation, a Title VII plaintiff establishes a *prima facie* case of sex discrimination by showing: 1) membership in a protected class; 2)

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[1] 29 U.S.C. §§ 621, *et seq.*

[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

[3] 42 U.S.C. §§ 2000e, *et seq.*

that she was subjected to an adverse employment decision; 3) that she was qualified for the position; and 4) that similarly situated males were treated more favorably. Once a *prima facie* case has been established, the burden shifts to the defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged employment decision. *Texas Dept. of Public Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The burden is one of *production* only, and not persuasion. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

If the defendant meets its burden of production, the plaintiff is then afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253. Notwithstanding the shifting evidentiary burden, however, the ultimate burden of proving *intentional* discrimination by the defendant always remains with the plaintiff. *Id.*

The evidentiary and proof burdens are substantially different for an EPA claim. First, the plaintiff establishes a *prima facie* case by demonstrating: 1) that different wages were paid to employees of the opposite sex; 2) that the employees did equal work which required equal skill, effort and responsibilities; and 3) that the employees had similar work conditions. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974).

If the Plaintiff establishes a *prima facie* case, the defendant must then establish that the wage differential is justified by one of the EPA's four exceptions, *i.e.*, that it is based on: 1) a seniority system; 2) a merit system; 3) a system which measures earnings by quantity or quality of

production; or 4) any other factor other than sex. *Corning Glass Works*, 417 U.S. at 196; 29 U.S.C. § 206(d)(1). Unlike the *McDonnell Douglas* formulation, the defendant's burden is not merely to articulate a reason. The exceptions are affirmative defenses, on which an employer bears the burden of *proof*. *Id.* Because the EPA defendant does not prevail by merely *articulating* its reason for the pay disparity, the final evidentiary burden shifting under *McDonnell Douglas* is not necessary. The standard of proof for demonstrating pretext enunciated by this Court in *Reeves*, therefore, is not directly applicable to a claim under the EPA.

This is not to say that evidence that an employer's proffered reason for a pay disparity is a mere pretext cannot be relevant in an EPA case, however. Such evidence would certainly bear on the issue whether the defendant has met its burden of establishing one of the affirmative defenses. Moreover, in the context of a motion for summary judgment by the employer, the presence or absence of evidence that the reason for a challenged pay disparity advanced by the defendant was not the true reason could bear on the issue whether the plaintiff, as the non-moving party, had met her burden under Fed.R.Civ.P. 56(c) to "set forth facts showing that there is a genuine issue for trial."

In arguing that the courts below imposed a burden upon her which is not permitted under *Reeves*, Petitioner ignores the Rule 56 context for the district court's decision and the Sixth Circuit's affirmance. *Reeves* neither holds nor implies that summary judgment may never be granted in a discrimination case, whether under the ADEA, Title VII or the EPA. To the contrary, this Court stated:

> Certainly there will be instances where, although a plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational fact-finder could conclude that the action was discriminatory.

Reeves, 530 U.S. at 148.

Nor does *Reeves* purport to relieve the nonmoving party from her evidentiary burden of establishing the existence of a genuine issue of material fact in response to a properly supported motion under Rule 56, in order to permit submission of the case to a jury. "[W]e have reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact.' " *Id.*, quoting *St. Mary's Honor Center*, 509 U.S. at 716.

Here the District Court found that Respondents had met their initial Rule 56 burden of establishing the absence of a genuine issue of material fact regarding the affirmative defense that Petitioner's pay differential was based on a factor other than sex. The burden then rested upon Petitioner to establish the existence of a genuine factual issue regarding that defense, whether by showing it to be a mere pretext or otherwise. The District Court found, and the Circuit Court agreed, that Petitioner had failed to come forward with evidence sufficient to call Respondents' reason into question.

As this Court recognized in *Reeves*, judgment as a matter of law should be granted under Fed.R.Civ.P. 50 when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Reeves*, 530 U.S. at 149. The standard for granting summary judgment under Rule 56 is the same. *Id.*, 530 U.S. at 150. The Circuit

Court's opinion affirming the grant of summary disposition to Respondent placed no burden upon Petitioner other than that required under Rule 56, and is in no way in conflict with this Court's opinion in *Reeves*.

Petitioner offers six "examples" of purported rejection of *Reeves* by the Circuit Court, each of which is based on a distortion of the opinion below. Analysis of these "examples" in comparison with the actual language of the opinion demonstrates the poverty of Petitioner's argument.

A. THE CIRCUIT COURT DID NOT REQUIRE DIRECT EVIDENCE OF PRETEXT.

First, the Circuit Court did not require that Petitioner produce "direct evidence that the Respondents did not 'honestly' believe the defenses to which they were testifying." [Petition at 9-10]. To the contrary, the portion of the opinion to which Petitioner cites states:

> The record, however, contains *no evidence to suggest* that Lanyon and Vondale did not honestly oppose plaintiff becoming a shareholder because of her handling of the waiver issue, or that their vocal opposition did not motivate others to vote with them. It was because of their vocal opposition that plaintiff faced unemployment as well as rejection as a shareholder.

[Ct. of App. Op.; App. A at 18a (emph. added)[4]].

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[4] Citations to the Appendix will refer to the Appendix submitted by Petitioner.

In *Reeves*, this Court held that a plaintiff's *prima facie* case, "*combined* with sufficient evidence to find that the employer's asserted justification is false," can create a triable issue regarding unlawful discrimination. *Reeves*, 530 U.S. at 128 (emph. added). Even the dissent below recognized that an EPA plaintiff bears the burden of producing evidence of falsity of the defendant's reason "where a reasonable jury viewing the defendant's evidence could only find for the defendant. . . . " [Ct. of App. Op.; App. A at 25a, quoting from *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 800 (6th Cir. 1998)].

In relying on the absence of evidence calling into question the validity of Respondent's reasons for Petitioner's salary structure, the Circuit Court did not depart from any holding in *Reeves*.

B. THE CIRCUIT COURT DID NOT REFUSE TO CONSIDER INFERENCES FROM PETITIONER'S PRIMA FACIE CASE.

Petitioner claims that the Circuit Court "refused to consider the inferences that could be drawn from the Plaintiff's *prima facie* case." *Reeves* did not, of course, address what inferences might be drawn from the *prima facie* showing required under the EPA, nor does Petitioner identify what those inferences might be.[5] More to the point, *Reeves* did not hold that a *prima facie* showing

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[5] Further, Petitioner offers no legal authority for the proposition that a showing of a pay disparity – of any magnitude – between a female and male employee for equal work on jobs requiring equal skill, effort and responsibility (the elements of a *prima facie* case under the EPA) raises any inference that would tend to negate a defendant's affirmative defense that the disparity was based on a factor other than sex.

alone, without evidence of pretext, can be sufficient to create a triable issue after the defendant has met its evidentiary burden of production under *McDonnell Douglas*.

As *Reeves* reiterated, the presumption of discrimination created by a *prima facie* showing in a Title VII or ADEA case "drops out of the picture once the defendant meets its burden of production." *Reeves*, 530 U.S. at 143. In requiring that Petitioner come forward with evidence bearing on the truth of her employer's demonstrated reason for the pay disparity, beyond the fact of that disparity, the Circuit Court opinion does not conflict with any decision of this Court.

C. THE CIRCUIT COURT DID NOT HOLD THAT DISCRIMINATION COULD NOT BE INFERRED FROM A "FALSE" REASON.

The Circuit Court did not find that discrimination could not be inferred from a defendant's assertion of a false reason for the wage disparity, as Petitioner asserts. Rather, the court determined that Petitioner had failed to produce evidence sufficient to raise a triable issue regarding whether Respondents' reasons were false or whether her gender was a factor in any of the alleged actions. Notwithstanding Petitioner's characterization, her argument is simply that the Circuit Court erred in assessing the evidence of record, and not that it relied on a holding in conflict with *Reeves*.

D. THE CIRCUIT COURT DID NOT REFUSE TO CONSIDER ANY ALLEGED "DISCRIMINATORY" STATEMENTS.

Again, Petitioner mischaracterizes her disagreement with the Sixth Circuit's assessment of the evidence of record as a legal departure from this Court's holdings. The Circuit Court's opinion directly addressed the statements alleged by Petitioner and found that they could not support an inference of discrimination: "These comments could not lead a rational trier of fact to conclude that the alternative [compensation] formula was first offered to plaintiff and then extended for a second year because of her sex." [Ct. of App. Op.; App. A at 19a]. This determination in no way conflicts with this Court's holdings in *Reeves*.

E. THE CIRCUIT COURT MADE NO CREDIBILITY DETERMINATIONS.

In the passage from its opinion cited by Petitioner, the Circuit Court did not *resolve* an issue of credibility: it found that "there *was* no genuine issue of material fact on the credibility of defendants' explanation for the decision not to take a vote on her shareholder status." [Ct. of App. Op.; App. A at 22a (emph. added)]. As with any other fact issue, an issue regarding credibility must be established by the non-moving party in order to defeat a summary judgment motion.[6] In finding that there was no credibility

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[6] *Cf. Crawford-El v. Britton*, 523 U.S. 574, 600, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) ("if the defendant-official has made a properly supported motion, the plaintiff may not respond simply with general attacks upon the defendant's credibility").

issue, the Circuit Court opinion does not conflict with *Reeves* or any other opinion of this Court.

F. THE CIRCUIT COURT DID NOT IMPERMISSIBLY CONSIDER EVIDENCE FAVORABLE TO RESPONDENTS THAT A JURY IS NOT REQUIRED TO ACCEPT.

In *Reeves*, this Court reiterated the principle that, in reviewing the record as a whole in the context of a Rule 50 motion, a court must "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 151, citing Wright & Miller, Federal Practice and Procedure § 2529 (2d ed. 1995). The opinion went on to explain (also citing Wright & Miller) that a court should also "give credence" to "evidence supporting the moving party that is uncontradicted and unimpeached. . . . " *Id.*[7]

Petitioner seizes upon this statement to claim that the Circuit Court opinion conflicts with *Reeves* in finding that there was no evidence to support her claim that she was never offered the standard formula for compensation. The portion of the opinion below of which Petitioner complains reads: "Despite plaintiff's claim that she was never offered the standard formula, the evidence shows that the firm's standard formula was explained to plaintiff and that Coon was prepared to recommend hiring her under the standard formula." [Ct. of App. Op.; App. A at 16a].

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[7] As this Court has previously recognized, uncontradicted, unimpeached evidence from an "interested" witness need not be disregarded where there is no indication in the record of a lack of candor. *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 51 S.Ct. 453, 75 L.Ed. 983 (1931).

Petitioner has not pointed to any evidence in the record which calls this finding into question, or raises any issue regarding a lack of candor by the witnesses upon whose testimony the District Court and Court of Appeals relied. Accordingly, she has not demonstrated any conflict between *Reeves* and the decisions below.

II. THE SIXTH CIRCUIT OPINION BELOW DOES NOT CONFLICT WITH DECISIONS OF ANY OTHER CIRCUIT ON ANY IMPORTANT MATTER.

Petitioner posits a "significant variation" among Circuit Courts regarding the burdens of proof in EPA cases as a ground for acceptance of her petition. In fact, each of the Circuits has squarely held that, once the plaintiff meets her initial burden of establishing a *prima facie* case, the burden of *proof* shifts to the defendant to establish one of the four statutory exceptions as an affirmative defense.[8]

In reality, Petitioner is arguing that summary judgment under Rule 56 is never proper in a case under the EPA when the plaintiff has established her *prima facie* case. She has not, however, cited a single case where a Circuit Court has so held. In fact, every Circuit which has addressed the issue has held that summary disposition is

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[8] *See, e.g., McMillan v. Massachusetts S.P.C.A.*, 140 F.3d 288, 298 (1st Cir. 1998); *Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3d Cir. 2000); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 613-14 (4th Cir. 1999); *Peters v. City of Shreveport*, 818 F.2d 1148, 1155 (5th Cir. 1987); *Fyfe v. City of Fort Wayne*, 241 F.3d 597, 600 (7th Cir. 2001); *Hutchins v. International Brotherhood of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999); *Stanley v. University of Southern California*, 178 F.3d 1069, 1075 (9th Cir. 1999); *Goodrich v. International Brotherhood of Electrical Workers, AFL-CIO*, 815 F.2d 1519, 1523-24 (D.C. Cir. 1987).

properly granted where, based on the record evidence, there is no genuine issue of material fact regarding the employer's affirmative defense, and no reasonable jury could find that the challenged pay differential was based on sex.

In *Wollenburg v. Comtech Manufacturing Co.*, 201 F.3d 973 (7th Cir. 2000), for instance, the district court granted summary to disposition to the employer because, although the plaintiff had established a *prima facie* case, the employer had demonstrated that she was paid less than her comparators because of their greater experience. The Seventh Circuit affirmed, finding that experience was a "factor other than sex," the defendant had demonstrated that the comparators had more supervisory experience, and "there was no genuine issue of material fact over the validity" of the experience differential being the reason for the pay disparity. *Wollenburg*, 201 F.3d at 976.

Similarly, in *Stanley v. University of California*, 178 F.3d 1069 (9th Cir. 1999), the court found that the plaintiff had raised a genuine issue regarding her *prima facie* case, but that the defendant had offered evidence which "convincingly support[ed]" its claim that the challenged pay differential was based on a factor other than sex. In the context of a summary judgment motion, the burden then fell on the plaintiff to demonstrate the existence of a triable issue regarding the affirmative defense.

> Where the defendant demonstrates that a pay differential was based on a factor other than sex, the employee may prevail by showing that the employer's proffered nondiscriminatory reason is a "pretext for discrimination." [Citation omitted.] On this appeal, [plaintiff] bears the burden

> of demonstrating a material fact regarding pretext in order to survive summary judgment.

Stanley, 178 F.3d at 1076.

The Fourth Circuit, in *Brinkley v. Harbor Recreation Club*, 180 F.3d 598 (4th Cir. 1999), has also upheld the award of summary judgment on the basis that the employer had established the factor "other than sex" defense. The court held: "When the defendant produces such evidence supporting its affirmative defense, the burden of production shifts back to the plaintiff who 'must come forward with "specific facts showing there is a genuine issue for trial." ' *White v. Rockingham Radiologists, Ltd.*, 820 F2d 98, 101 (4th Cir., 1987) (quoting Fed.R.Civ.P. 56(e))." *Brinkley*, 180 F.3d at 614.[9] Rejecting the plaintiff's argument that establishment of a *prima facie* case was itself sufficient to create a triable issue, the Fourth Circuit upheld the grant of summary judgment, stating: " . . . evidence that merely points to the existence of a pay differential does nothing to further the plaintiff's cause. To survive summary judgment, the plaintiff must produce evidence, direct or circumstantial, that controverts the defendant's evidence that a legitimate ground justifies the pay difference." 180 F.3d at 615, n. 13.

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[9] The First, Third and D.C. Circuits have reversed grants of summary judgment on the ground that the plaintiff *had* demonstrated the existence of a genuine issue, at least implicitly recognizing that judgment under Rule 56 would be proper in the appropriate case. *See, Byrd v. Ronayne*, 61 F.3d 1026 (1st Cir. 1995); *Stanziale v. Jargowski*, 200 F.3d 101 (3rd Cir. 2000); *Goodrich v. Int'l Brotherhood of Electrical Workers*, 815 F.2d 1519 (D.C. Cir. 1987).

The Second, Eighth and Eleventh Circuits have also upheld summary judgment where the plaintiff failed to establish a genuine issue regarding the employer's affirmative defense. *See, Belfi v. Prendergast,* 191 F.3d 129 (2nd Cir. 1999); *Hutchins v. Int'l Brotherhood of Teamsters,* 177 F.3d 1976 (8th Cir. 1999); *Irby v. Bittick,* 44 F.3d 949, 954 (11th Cir. 1995).

There is no conflict among the Circuit Courts regarding whether summary judgment may be granted where the defendant has established one of the affirmative defenses under the EPA and the plaintiff has failed to come forward with evidence sufficient to raise a triable issue regarding that defense. The "conflict" cited by Petitioner among the Second, Sixth, Tenth and Eleventh Circuits, insofar as it can be seen as a conflict at all, is purely semantic.

In a footnote in *Buntin v. Breathitt County Bd. of Educ.,* 134 F.2d 796 (6th Cir. 1998), the Sixth Circuit criticized the Eleventh Circuit's statement in *Irby v. Bittick, supra,* that once an EPA defendant meets the burden of establishing its affirmative defense, "the plaintiff must rebut the explanation by showing with affirmative evidence that it is pretextual or offered as a post-event justification for a gender-based differential." The Sixth Circuit properly noted, however, that an EPA plaintiff "bears the burden of producing evidence of pretext . . . where a reasonable jury viewing the defendant's evidence could find only for the defendant. . . . " *Buntin,* 134 F.2d at 800, n. 7.

The language which the Sixth Circuit quoted from *Irby* is broader than its true holding. The Eleventh Circuit correctly held that an EPA defendant bears the burden of proving the affirmative defense. The Court stated that a party moving for summary judgment must demonstrate

that "on all of the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party." *Irby*, 44 F.3d at 953. The Court then noted that, if that burden is met, the non-moving party must "come forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Id.* Under the circumstances of the particular case, the Eleventh Circuit was correct in stating that, where an EPA defendant has met its burden under Rule 56, the plaintiff is required to come forward with affirmative evidence from which a jury could find that the defendant's reason was pretextual.

The standards applied by the Second Circuit are consistent with those applied by the other circuits and by this Court. Contrary to Petitioner's characterization, *Aldrich v. Randolph Central School District*, 963 F.2d 520 (2nd Cir. 1992), did not hold that every EPA plaintiff must only show that she is doing the same work as male employees for lower pay in order to survive a summary disposition motion.

In *Aldrich*, the employer's affirmative defense was that the pay differential was based on a job classification system. The Second Circuit reversed the trial court's order granting summary judgment to the employer, holding that there was a genuine issue of fact regarding the affirmative defense. Demonstrating the lack of any conflict with the Sixth and Eleventh Circuits, however, the Second Circuit went on to state: "Additionally, we note *the plaintiff may counter the defendant's affirmative defense by offering evidence showing that the reasons sought to be proved are a pretext* for sex discrimination. *Aldrich*, 963 F.2d at 526 (emph. added).

Ryduchowski v. Port Authority, 203 F.3d 135 (2nd Cir. 2000), does not represent a "subsequent shifting" of burdens, as argued by Petitioner; it demonstrates the consistency of the Second Circuit's correct allocation of the burden of proof in EPA cases. The Second Circuit recognized that, once a *prima facie* case had been established, the defendant bore the burden of proving one of the statutory affirmative defenses.[10] Its holding was simply that there had been sufficient evidence at trial to support a jury finding that the challenged pay differential was not based on a valid or consistently applied merit system.

Finally, Petitioner mischaracterizes the holding in *Tidwell v. Fort Howard Corporation*, 989 F.2d 406 (10th Cir. 1993), in attempting to manufacture a split among the circuits. *Tidwell* was an appeal by the plaintiff from a "somewhat unusual" jury verdict that the defendant committed a "nonwillful" violation of the EPA, and the district court's finding that she had failed to demonstrate intentional discrimination in support of her Title VII claim. Thus, in stating the defendant's burden after a *prima facie* case has been established under the EPA, the Tenth Circuit opinion is couched in language appropriate to the specific trial setting below:

> If a *prima facie* case is so established under the EPA the *defendant* must undertake the burden *of persuading* the jury that there existed reasons for the wage disparity which are described in the Equal Pay Act [citation omitted]. ***

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[10] The court in *Ryduchowski* also recognized the principle that evidence of pretext may be used by a plaintiff to counter a defendant's affirmative defense, quoting directly the language from *Aldrich* cited above.

> If the defendant fails to convince the jury with its evidence of one or more of the "affirmative defenses" listed above the plaintiff will prevail on her *prima facie* case.

Tidwell, 989 F.2d at 409.

To read the quoted passage as a proscription against summary judgment in all EPA cases where the plaintiff has established a *prima facie* case is pure sophistry. The court in *Tidwell* did not purport to address the parties' burdens under Rule 56, and neither the language nor the facts of the case can support the interpretation urged by Petitioner.

There is no conflict among the Circuit Courts which would bear in any manner on the decision of the Sixth Circuit from which Petitioner seeks review, and this Court should deny her Petition.

III. THE SIXTH CIRCUIT CORRECTLY APPLIED THE PROPER RULE OF LAW TO THE RECORD EVIDENCE IN AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

Since this case presents no conflict with opinions of this Court or of the other Circuit Courts, the Petition can only be seen as a request that this Court review the determination by the District Court, affirmed by the Circuit Court, that Petitioner failed to raise a triable issue regarding whether Respondent's nondiscriminatory reasons for her compensation structure were pretextual. The actual error claimed by Petitioner, therefore, is misapplication of established rules governing summary judgment by the courts below, an issue which only "rarely" justifies certiorari. Supreme Court Rule 10.

Even were this Court otherwise disposed to review such issues, however, the record reveals no error in the grant of summary judgment to Respondent. Contrary to Petitioner's assertions, she did not present evidence sufficient to raise a genuine issue regarding whether Respondent's demonstrated reasons for Petitioner's compensation system and treatment at the firm were false or pretextual.

Petitioner seems to indicate that because the minutes of the May 22, 1995 Board Meeting do not articulate any criticisms of Petitioner, the reasons for denying her the shareholder status and the formula must be false. Petitioner cites no legal authority for this position, however. Moreover, Petitioner never disputed the issues which arose between her and two other female shareholders, Janet Lanyon and Carol Vondale, or that Lanyon and Vondale were highly upset at Petitioner's conduct with regard to a conflict of interest and her refusal to address it through established firm procedures. Further, Petitioner never disputed the fact that as a result of the super majority requirements, and the proxies held by at least one other member of the Board, the decision was made not to hold the vote to elevate Petitioner to shareholder status.

Likewise, Petitioner produced no evidence to show that the decision to continue her employment agreement on the same terms and conditions for a second year was any way linked to her gender. Respondents demonstrated that the decision to deny shareholder status was based on the female shareholders' dissatisfaction with her conduct. Notwithstanding that dissatisfaction, Petitioner's employment was not terminated; her contract was extended for an additional year. The undisputed evidence

shows no link between Respondents' actions and Petitioner's gender, especially in light of the abundant evidence of non-discriminatory practices at the firm.

Petitioner's claim that Respondents did not reference their asserted defense in answers to interrogatories overlooks the fact that these interrogatories were primarily concerned with identification of the individuals that complained about her. Respondents clearly provided the identification, by name, of the shareholders who complained about Petitioner and the dates of such complaints. With regard to the conflict between Lanyon, Vondale and Petitioner, the deposition testimony of Petitioner and all other witnesses was consistent. There were no factual discrepancies regarding the event or Lanyon or Vondale's level of dissatisfaction with Petitioner's conduct.

Finally, Petitioner again points to alleged statements by Coon and Mastrangel, claiming that they somehow provide evidence that her compensation system was based on her sex. Petitioner's attempts are misguided for several reasons. The comments, if made, were unquestionably gender neutral.[11] As the Circuit Court properly held: "[t]hese comments could not lead a rational trier of fact to conclude that the alternative formula was first

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[11] The fact that Coon commented that Vondale did not need to work because her spouse earned a great deal of money is a comment that could be applied equally to males as well as females. In fact, Coon was just echoing what Vondale herself had said. Similarly, Mastrangel's comment was a reiteration of Petitioner's own prehire projection that she would bill only 1500 hours per year due to "preexisting obligations." His comment clearly related to an objection to her expressed billing potential, equally applicable to a male or a female.

offered to Petitioner and then extended for a second year because of her sex." [Ct. Of App. Op.; App. A at 19a].

Moreover, it was Coon who initially recommended Petitioner's hire to the Board of Directors and proposed that she be compensated on the standard formula, which raises an inference of the *lack* of discriminatory animus. *See Buhrmaster v. Overnite Transport Co.*, 61 F.3d 461, 463 (6th Cir. 1995); *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991); *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173 (8th Cir. 1992). Coon was not even present at the May 1995 Board Meeting when Petitioner was rejected as a shareholder and the decision was made to continue her employment agreement for an additional year.

Petitioner failed to show that these comments are "direct" evidence of discrimination. She did not show that either of the comments was made at the time of the decision she complains of, by decision makers, or in an unambiguous manner which could support an inference that her gender was a factor in the employment decisions.[12]

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[12] *See, e.g., Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (isolated and ambiguous statements are "too abstract, in addition to being irrelevant and prejudicial to support a finding of . . . discrimination."); *Kennedy v. Schoenberg, Fisher and Newman, Ltd.*, 140 F.3d 716 (7th Cir.), *cert. denied*, 525 U.S. 870, 119 S.Ct. 167, 142 L.Ed.2d 136 (1998) (casual statement in conversation unrelated to issues leading to discharge not direct evidence of discriminatory intent); *Fernandes v. Costa Brothers Masonry*, 199 F.3d 572, 583 (1st Cir. 1999) ("In our judgment, inherently ambiguous statements, without more, cannot supply the strong evidence that . . . courts rightfully demand as a prerequisite to mixed-motive analysis.")

The EPA's fourth affirmative defense – any other factor other than sex – "is a broad 'catch-all' exception [that] embraces an almost limitless number of factors, so long as they do not involve sex." *Dey v. Colt Const. & Devel. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994), quoting from *Fallon v. State of Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989). The Circuit Court properly determined that Petitioner had failed to raise a genuine issue of fact regarding whether Respondents' established affirmative defense was false or pretextual, and therefore correctly held that summary judgment was properly granted to Respondents. Since the affirmative defense also constitutes a legitimate nondiscriminatory reason for the pay disparity, the Circuit Court also properly upheld summary judgment on Petitioner's claim under the ELCRA.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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